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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 JOHN ADAMSON, MICHAL CLARK,
15 JOHN LLEWELLYN, ANDREA
16 STANLEY and JACKIE WARNCKE,
17 on Behalf of Themselves and all Others
18 Similarly Situated,

19 Plaintiffs,

20 v.
21 ADT, LLC d/b/a ADT SECURITY
22 SERVICES and DOES 1 through 10,
23 inclusive,

24 Defendant.

25 Civil Action No. 2:12-cv-10558-DMG-FMO

26 **PLAINTIFFS' MEMORANDUM OF**
27 **POINTS AND AUTHORITIES IN**
28 **OPPOSITION TO DEFENDANT**
29 **ADT LLC'S MOTION FOR**
30 **SUMMARY JUDGMENT**

31 Judge: Hon. Dolly M. Gee

32 Hearing Date: April 4, 2014

33 Time: 2:00 p.m.

34 Courtroom: 7

35 **PUBLIC VERSION**

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I. INTRODUCTION

Plaintiffs Adamson, Clark, Stanley and Warncke specifically allege that the “contract termination charges”¹ charged by ADT are unconscionable and unenforceable penalties under California Civil Code §1671, and that they violate the Unfair Competition Law, Cal. Bus. & Prof. Code §§17200, *et seq.* (the “UCL”), the Consumers Legal Remedies Act, Cal. Civ. Code §§1750, *et seq.* (the “CLRA”), and the Maryland Consumer Protection Act, Md. Code Com. Law §§13-101 *et seq.* (the “MCPA”). Plaintiff Llewellyn alleges that ADT’s agreements are credit transactions subject to the Truth In Lending Act, 15 U.S.C. §§1601 *et seq.* (“TILA”) and that ADT failed to comply with the requirements of TILA.

ADT’s position in its motion is a classic “Catch 22.” ADT argues that neither a customer who pays a CTC nor a customer who refuses to pay a CTC can bring claims against ADT for its unlawful early termination fees; if ADT’s argument is accepted than *no one* can effectively prosecute this claim. Under ADT’s reasoning, if a class member is charged a CTC and pays it, the voluntary payment doctrine prevents her from suing under Cal. Civ. Code §1671, which specifically permits actions to void consumer penalties and forecloses any right to obtain relief under the UCL, CLRA and the MCPA. But class members who are charged CTCs and do not pay them, according to ADT, cannot bring an action under the UCL, CLRA, or the MCPA because they have not suffered an “actual injury.” If accepted by the Court, ADT’s arguments would effectively repeal the consumer protection statutes at issue and leave Plaintiffs and the Class without any remedy to redress the assessment, enforcement, and collection of unlawful contractual penalties that violate Cal. Civ. Code. §1671, the UCL, CLRA and the MCPA.

ADT further argues that its CTC of 75% of the remaining balance of its fixed-term contracts is not really a liquidated damages provision to compensate for breach, but is instead an alternative means of performing the contract. But ADT's CTC

¹ Referred to herein as “CTCs,” early termination fees, or “ETFs.”

1 provision clearly contemplates the event of default or breach by the customer. As a
2 result, ADT's CTC "cannot escape examination in light of pertinent rules relative to
3 the liquidation of damages." *See Garrett v. Coast & S. Fed. Sav. & Loan Ass'n*, 9
4 Cal. 3d 731, 737-38 (1973). Thus, to characterize ADT's CTC as an alternative
5 means of performance "would be to condone a result which, although directly
6 prohibited by the Legislature, may nevertheless be indirectly accomplished through
7 the imagination of inventive minds." *Id.*

8 ADT also erroneously claims that Plaintiffs' TILA claims are time-barred and
9 that ADT's sale of alarm equipment and monitoring services is not a "credit" sale as
10 a matter of law. The TILA claims are timely and material issues of fact remain in
11 dispute. For these reasons, and the reasons set forth below, ADT's motion for
12 summary judgment on all claims should be denied in its entirety.

13 II. STATEMENT OF FACTS

14 ADT requires that its customers abide by agreements distributed on preprinted
15 forms presented on a "take it or leave it" basis. Undisputed Fact ("UF") 46. All of
16 ADT's current agreements are two to three year term contracts that contain a CTC of
17 75% of the remaining balance. UF 47. ADT's CTC is a penalty charge that ADT
18 instituted to reduce customer attrition, increase revenue, compete with other security
19 companies, and to streamline administrative procedures. Porpora Dep. 54:10-55:4
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

A. John Adamson

After he signed a three-year term contract with ADT, in June 2012, Mr. Adamson's system broke down in January 2013. UF 48. Because his equipment was not effective, Mr. Adamson wanted to add additional door sensors but ADT refused to provide him with a code to enable him to do so himself. *Id.* The price to install the monitors was far in excess of what it would have cost him to purchase additional monitors. *Id.* In April 2013, Mr. Adamson cancelled his contract with ADT and paid a contract termination charge in the amount of \$500.51. UF Nos. 3, 4.

B. Michal Clark

Plaintiff Clark’s mother, Wilma Clark, was an ADT customer who had to cancel her ADT service because her declining health forced her to move to assisted living.² UF 50. Plaintiff Clark moved to Monrovia, California to care for his mother at the end of her life. UF 51. While he lived with her, Mr. Clark regularly contacted ADT to resolve problems with Ms. Clark’s ADT services. UF 52. After he cancelled his mother’s service on her behalf, his mother paid a CTC. *See Clark Dep. 36:20-21, 37:21-22, 38:1-3, 39:1-16, 41:1-7, 130:16-21, 133:18-19, 134:11-15, Fisher Ex. C; see also UF 50.*

C. Jackie Warncke

Jackie Warncke signed a three-year contract with Broadview, a predecessor of ADT, in May 2010 for her Maryland residence. UF 31. In 2011, ADT told her that her alarm system was unreliable and that she needed to install more equipment. Warncke Dep. 62:6-19, 64:6-13, 50:15-19, Fisher Ex. D. She declined. *Id.* at 50:11-21. ADT informed her that it was therefore going to terminate her service. *Id.* at 48:13-22, 66:3-7; *see also id.* at 67:20-21, 64:25-65:5, 46:21-47:7. Ms. Warncke did not pay the \$712.09 CTC that ADT charged her because she felt it was unfair to have to pay for services that ADT failed to provide. *Id.* at 13:24-14:1, 19:13-21, 21:16-23, 64:25-65:5 *see also* UF 32. Ms. Warncke, did, however,

² Plaintiff Michal Clark is his mother's successor in interest in this action.

1 wrongfully pay for the services she did not receive because ADT automatically
 2 deducted those charges from her bank account. *Id.* at 21:5-23, 81:15-19.³

3 **D. Andrea Stanley**

4 Andrea Stanley signed a three-year contract with ADT. *See* Slattery Ex. R.
 5 After losing her job, Ms. Stanley terminated her ADT service to reduce her monthly
 6 expenditures. Stanley Dep. 29:6-13, Fisher Ex. E. Based on her discussion with
 7 ADT, she believed ADT had waived any termination fee. *Id.* at 31:12-17. Months
 8 later, Ms. Stanley learned she owed a CTC from her credit report. *Id.* at 32:5-10.

9 **E. John Llewellyn**

10 Mr. Llewellyn has had alarm monitoring services with ADT for many years.
 11 UF 58. His alarm monitoring service malfunctioned in 2011 and he contacted ADT.
 12 Llewellyn Dep. 12:18-25, Fisher Ex. F. ADT advised Mr. Llewellyn that he had a
 13 choice: pay a large up-front fee for labor and equipment or agree to a new three-year
 14 contract that would cover the installation of new equipment. UF 59. On August 11,
 15 2011, Mr. Llewellyn entered into a new three-year contract. Llewellyn Dep. 13:8-
 16 10, Fisher Ex. F; Slattery Ex. K. In October 2012, Mr. Llewellyn received a notice
 17 of rate increase from ADT. UF 26. The letter advised Mr. Llewellyn that ADT had
 18 increased its monthly fees and Llewellyn felt it was a “fait accompli” that he had to
 19 accept. Llewellyn Dep. 62:8- 63:6, Fisher Ex. F.

20 **III. THE SUMMARY JUDGMENT STANDARD**

21 The moving party bears the initial burden of establishing the absence of a
 22 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
 23 Once the initial burden has been met, Rule 56(c) requires that the nonmoving party
 24 designate specific facts showing that there is a genuine issue. *Id.* at 324. A dispute

25
 26 ³ In addition, on August 2, 2011, ADT withdrew payment for services during August
 27 directly from her bank account. Warncke Dep. 81:15-19, Fisher Ex. D. Because
 28 ADT terminated her service in August she paid for the remaining month of service
 although she did not receive any service. *Id.* at 13:2-8.

1 is genuine “if the evidence is such that a reasonable jury could return a verdict for
 2 the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
 3 “[T]he inferences to be drawn from the underlying facts … must be viewed in the
 4 light most favorable to the party opposing the motion.” *Matsushita Elec. Indus. Co.*
 5 *v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (quotations omitted).

6 IV. ADT’S CTC IS NOT AN ALTERNATIVE MEANS OF PERFORMANCE

7 ADT argues that its CTC of 75 percent of the remaining monthly fees is “not
 8 subject to Cal. Civ. Code §1671 (d)” because it “is an alternative means of
 9 performance as a matter of law.” Mot. at 10. But the law in California has long
 10 recognized that characterizations of contract terms as “alternative performance” are
 11 likely to be “devices for avoiding limitations on penalty clauses.” Justin Sweet,
 12 *Liquidated Damages In California*, 60 Cal. L. Rev. 84, 94 (1972), Fisher Ex. G.
 13 Thus, courts have held that a contractual provision will be deemed an alternative
 14 method of performance *only if it is not a remedy for breach of contract*. See
 15 *Garrett*, 9 Cal. 3d at 737-38; see also *Lowe v. Mass. Mut. Life Ins. Co.*, 54 Cal. App.
 16 3d 718, 731-32 (1976). In *Garrett*, the court explained:

17 Thus when it is manifest that a contract expressed to be performed in
 18 the alternative **is in fact a contract contemplating but a single, definite performance with an additional charge contingent on the breach of that performance, the provision cannot escape examination in light of pertinent rules relative to the liquidation of damages.**

21 *Garrett*, 9 Cal. 3d at 738 (citations omitted, emphasis added). To hold otherwise,
 22 “would be to condone a result which, although directly prohibited by the Legislature,
 23 may nevertheless be indirectly accomplished through the imagination of inventive
 24 minds.” *Id.* at 737. Indeed, “the legislative declarations of §§1670 and 1671 would
 25 be completely frustrated.”⁴ *Id.* In deciding whether a contract provides for

26 ⁴ Under §1671(c) and (d), a liquidated damages clause in a consumer contract is
 27 presumed “void.” See *In re Cellphone Termination Fee Cases*, 193 Cal. App. 4th
 28 298, 322 (2011). Thus, ADT must show that its CTCs are valid. *Id.* ADT must
 show that (1) “fixing the amount of actual damages [was] impracticable” and (2) that

1 alternative performance or imposes liquidated damages for a breach, the Court must
 2 “look to substance rather than form in determining the ‘true function and character’”
 3 of the parties’ arrangement. *Blank v. Borden*, 11 Cal. 3d 963, 970 (1974) (quoting
 4 *Garrett*, 9 Cal. 3d at 735-7). The analysis depends on the mutual intentions of the
 5 parties at the time the contract was entered into, and does not depend on later
 6 circumstances such as who terminated the contract, why it was terminated, or even
 7 whether it was terminated. *See Garrett*, 9 Cal. 3d at 738.

8 To determine whether a clause provides for an alternative means of
 9 performance rather than for liquidated damages, courts evaluate whether a plaintiff
 10 was presented with a “rational choice” at the time of contracting. *See Blank v.*
 11 *Borden*, 11 Cal. 3d at 971. An examination of prior cases where courts have applied
 12 a “rational choice” analysis to find that a contract provision provided for an
 13 alternative means of performance unambiguously demonstrates that ADT’s CTC is
 14 not an alternative means of performance.

15 For instance, in *Blank*, the court held that a right-to-sell provision did not
 16 constitute a penalty in violation of Cal. Civ. Code §1671 because it included “the
 17 element of rational choice,” noting that the owner could have made the “realistic and
 18 rational choice” not to sell the property and to pay the agreed upon sum instead. *Id.*
 19 at 971. Under a “rational choice” analysis, the question for the Court to determine is
 20 “whether a reasonable man might look forward to either choice as a reasonable
 21 possibility” *Id.* at 971 n.7 (quoting Charles McCormick, *Handbook on the Law*
 22 *Of Damages* §154, at 617-18 (1935)). “[W]hile an alternative promise to pay money
 23 when it presents a conceivable choice is valid, yet, if a contract is made by which a
 24 party engages himself either to do a certain act or to pay some amount which at the

25
 26 the liquidated damages amount “represent[s] the result of a reasonable endeavor by
 27 the parties to estimate a fair average compensation for any loss ...” *Hitz v. First*
 28 *Interstate Bank*, 38 Cal. App. 4th 274, 288 (1995). Because ADT cannot meet either
 prong of the two part test, ADT’s CTC is void.

1 time of the contract no one would have considered an eligible alternative, the
 2 alternative promise to pay is unenforceable as a penalty.” *Id.*; *see also id.* at 970
 3 (“Here, however, we do not find that the contract before us is of the indicated
 4 character [of a liquidated damage clause]. Its terms in no sense contemplate a
 5 ‘default’ or ‘breach’ of an obligation by the owner upon whose occurrence payment
 6 is to be made....”); *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305,
 7 1315 (2005) (contract termination charge found to be an alternative performance
 8 provision rather than a liquidated damages provision where, unlike here, the contract
 9 had no fixed term: “Morris notes the lack of any specified duration in the merchant
 10 agreement makes payment of the termination fee inevitable. But this very
 11 inevitability takes the provision out of the realm of liquidated damages, which by
 12 definition are assessed only upon a breach.”).

13 In evaluating whether a contract provides for alternative performance, courts
 14 must also consider whether or not the subscriber contracts were adhesion contracts.
 15 In *Blank*, the fact that the broker contract at issue had been negotiated at arm’s length
 16 by parties with equal bargaining power was held to be a key reason to enforce the
 17 clause:

18 [I]t is important to recognize that we are not here concerned with a
 19 situation wherein the party who seeks to enforce the clause enjoyed a
 20 vastly superior bargaining position at the time the contract was entered
 21 into. On the contrary, the contract before us was one which was freely
 22 negotiated by parties dealing at arm’s length. While **contracts having**
 23 **characteristics of adhesion must be carefully scrutinized in order to**
 24 **insure that provisions therein which speak in terms of alternative**
 25 **performance but in fact exact a penalty are not enforced**, we believe
 26 that in circumstances such as those before us interference with party
 27 autonomy is less justified.

28 *Id.* at 972 (emphasis added, citations omitted). Here, on the other hand, it is
 29 undisputed that the subscriber contracts were contracts of adhesion – standardized
 30 form contracts imposed and drafted by the party with superior bargaining strength,
 31 which relegates to the other party only the opportunity to either adhere to the
 32 contract or reject it. UF 46.

1 ADT's reliance on *Minnick v. Clearwire U.S. LLC*, 174 Wash. 2d 443 (2012),
2 *Schneider v. Verizon Internet Services, Inc.*, 400 F. App'x. 136 (9th Cir. 2010), and
3 *Hutchison v. Yahoo! Inc.*, 396 F. App'x. 331 (9th Cir. 2010) for the proposition that
4 ADT's CTC is an alternative means of performance is clearly misplaced. In each of
5 those cases, at the time the plaintiffs entered into the contracts at issue, they were all
6 presented with a rational choice between a discounted term contract with a CTC, and
7 a month-to-month contract with no discount and no CTC. *Minnick*, 174 Wash. 2d at
8 446 (plaintiffs had a choice "between a month-to-month contract with no obligations
9 beyond the monthly subscription charge and a fixed-term contract that has a
10 discounted monthly subscription charge" as well as an ETF; plaintiffs "all **chose** the
11 fixed-term contract, for either one or two years." (emphasis added)); *Hutchison*, 396
12 F. App'x. at 333 (same); *Schneider*, 400 F. App'x. at 138 (same). This factual
13 distinction is critical, yet ignored by ADT. Indeed, because Plaintiffs (and all Class
14 members) were not presented with any such choice, all of ADT's cases are
15 inapposite.

16 Thus, ADT's contention that "[e]ach [opinion] answered the question by
17 examining the choice the customer faced between two alternatives at the time of
18 contracting, and finding the flexibility offered by either serving the term of the
19 contract or paying the ETF offered the customers a reasonable and rational choice" is
20 misplaced and misleading. *See* Mot. at 12. The *only* relevant inquiry is whether a
21 customer was presented with a "rational choice" *at the time of contracting*. *See*
22 *Garrett*, 9 Cal. 3d at 738; *Minnick*, 174 Wash. 2d at 446; *Schneider*, 400 F. App'x. at
23 138; *Hutchison*, 396 F. App'x. at 333; *see also Doral Bank PR v. Federal Home*
24 *Loan Mortgage Corp.*, 2010 WL 3984667, at *7 n.15 (E.D.Va. Oct. 7, 2010) ("In
25 both [*Hutchison* and *Schneider*], the ETF was a single lump sum that had a direct
26 relationship and close proximity to the costs the customers avoided under an
27 **alternative contractual arrangement**" (emphasis added)). Contrary to ADT's
28

1 misguided contention, the critical inquiry is *not* whether a customer had the so-called
 2 “flexibility” to remain in the contract or pay a CTC. *Id.*

3 ADT also disregards the analysis of whether a customer had a “rational
 4 choice” at the time of contracting all together, and leaps to the illogical conclusion
 5 that “[w]hat these precedents must mean is that a contract termination charge that
 6 *always* is materially *less* (25 percent less) than the remaining payments due under the
 7 contract must be an alternative means of performance.” *See* Mot. at 12 (emphasis in
 8 original). ADT’s characterization cannot be. Indeed, in *In re Cellphone Termination*
 9 *Fee Cases*, 193 Cal. App. 4th at 328, the court rejected the defendant’s arguments
 10 that an ETF provision in a cell phone contract provided for alternative performance,
 11 and found that a \$200 ETF constituted an unlawful penalty. *See also CMG Realty of*
 12 *Conn., Inc. v. Colonnade One Ltd. P’ship*, 36 Conn. App. 653, 663 (1995) (ETF was
 13 not an alternative performance provision because “[t]he ‘right’ to terminate under the
 14 circumstances here is legally indistinguishable from the power to breach a contract
 15 posed by any party whose contractual duties are executory.”). Similarly, as the court
 16 explained in *Mau v. L.A. Fitness Int’l, LLC*, 749 F. Supp. 2d 845, 849 (N.D. Ill.
 17 2010):

18 Fundamentally an alternative-performance analysis is conducted in
 19 response to the suggestion of an “attempt to disguise a provision for a
 20 penalty that purports to make payment of the amount an alternative
 21 performance under the contract” (Restatement (Second) of Contracts §
 22 356 cmt. c (1981) Courts should expect to find non-punitive forms
 23 of alternative performance clauses, as opposed to traditional liquidated
 24 damage clauses, where “the primary object of an alternative contract is
 25 performance, and it thus looks to a continuation of the relationship
 26 between the parties, rather than to its termination” (24 Williston on
 27 Contracts § 65:7 (Richard Lord, ed., 4th ed. 2010)). This exposition of
 28 the alternative-performance analysis makes clear that an analysis is not
 really applicable here. First, by definition there was and is no
 expectation of a continuing relationship between Mau and Fitness –
 exactly the opposite is true. Mau simply wanted to end his contract
 Surely the situation can be classified as nonperformance ... rather than
 alternative performance.

1 Here, because payment of the CTC is at best classified as nonperformance rather
2 than alternative performance, the Court should not be persuaded by ADT's attempt
3 to disguise its improper CTC penalty as an alternative means of performance. *See*
4 Mot. at 12.

5 **A. ADT Fails to Meet Its Burden to Prove Its CTC Is an
6 Alternative Means of Performance**

7 An examination of ADT's CTC shows that it "is in fact a contract
8 contemplating but a single, definite performance with an additional charge
9 contingent on the breach of that performance." *See Garrett*, 9 Cal. 3d at 738. In
10 practice, the CTC is clearly a remedial measure to be invoked upon breach because
11 ADT's adhesion contracts require that customers sign up for a two to three years and
12 pay the monthly charges for the entire term of the agreement. *See UF 47*. Unlike in
13 *Minnick, Hutchison, and Schneider*, ADT customers were never given the option to
14 choose between a term contract of two or three years with a CTC and a month-to-
15 month contract without a CTC. UFs 46, 47; *see, e.g.*, Porpora Dep. 58:5-12, Fisher
16 Ex. A. Indeed, ADT's two to three year contracts of adhesion provided no choice at
17 all. As such, ADT does not give its customers a rational choice with respect to the
18 CTC. The fact that ADT's agreements were adhesion contracts also compels the
19 rejection of the defense of alternative performance. *Blank*, 11 Cal. 3d at 972.

20 Moreover, the fact that ADT adopted the CTC to reduce attrition, compete
21 with other security companies, and streamline administrative procedures further
22 demonstrates that the CTC is not an alternative means of performance. Porpora Dep.
23 [REDACTED]
24 [REDACTED]

25 Fisher Ex. B; *see, e.g.*, *Mau*, 749 F. Supp. 2d at 849 (denying motion for summary
26 judgment: "Without question the [ETF] was a means of putting pressure on Mau to
27 adhere to the original terms of the agreement instead of cancelling the Agreement
28 and refusing to pay Fitness for the use of its personal training service."). This is

1 borne out by the very low collection rates for the CTC. Porpora Dep. 131:18-21,
 2 Fisher Ex. A. Accordingly, ADT's attempt to disguise its CTC as a provision for
 3 alternative means of performance must fail.⁵

4 **V. NONE OF PLAINTIFFS' CLAIMS FAIL AS A MATTER OF LAW**

5 **A. The Voluntary Payment Defense Is Not Available**

6 ADT also contends that Plaintiffs' claims are barred by the voluntary payment
 7 doctrine. Mot. at 16-17. Not so. Civil Code §1671(d) is plainly designed to protect
 8 consumers from excessive unlawful liquidated damages provisions. According to
 9 ADT, the payment of an unlawful penalty would deprive a plaintiff of her ability
 10 bring an action to recover it. *See Parino v. BidRack, Inc.*, 838 F. Supp. 2d 900, 908-
 11 09 (N.D. Cal. Sept. 26, 2011) (declining to find that CLRA, UCL, and FAL claims
 12 were barred by voluntary payment). If ADT's reasoning were applied here, the
 13 statutory claims asserted by Plaintiffs would be rendered meaningless and Plaintiffs
 14 would be deprived of any and all consumer remedies to redress the enforcement of
 15 contractual penalties that the Legislature has declared to be unlawful. Indeed, the
 16 defenses of waiver, voluntary payment, and estoppel are equitable defenses applied
 17 under principles of justice to protect an innocent party or "rescue justice in situations
 18 where the party seeking to take refuge behind the bar of a statute of limitations or a
 19 contractual limitation of the same nature, has conducted himself in such a manner
 20 that to apply the bar in his favor would shock the conscience of equity." *See Elliano*
 21 *v. Assurance Co. of Am.*, 3 Cal. App. 3d 446, 450 (1970) (citations omitted).

22 For these reasons, courts routinely (and rightly) hold that the voluntary
 23 payment doctrine is not a permissible defense where its application would be

24 ⁵ ADT concedes that its "legacy" contracts with a "flat fee" CTC existed during the
 25 class period. Mot. at 12, n.2. ADT conclusorily argues that its "flat fee" CTC is an
 26 alternative means of performance. *Id.* For the same reasons discussed herein, the
 27 flat fee CTC cannot be considered an alternative means of performance. Moreover,
 28 ADT has *not* moved for summary judgment on the grounds that the 100% CTC
 provides for alternative performance, but acknowledges that Ms. Warncke's contract
 has just such a provision. Mot. at 9.

1 contrary to state consumer protection statutes. For example, in *Huch v. Charter*
 2 *Communications, Inc.*, 290 S.W. 3d 721, 725 (Mo. 2009), the Missouri Supreme
 3 Court stated that because the fundamental purpose of the Merchandising Practices
 4 Act (“Act”) is to protect consumers, “certain legal principles are not available to
 5 defeat claims authorized by the act.” As the court stated in *Huch*, the legislature,
 6 having enacted “paternalistic legislation designed to protect those that could not
 7 otherwise protect themselves, ... would not want [those] protections ... to be waived
 8 by those deemed in need of protection.” *Id.* at 727. ***To allow [the defendant] to
 9 avoid liability for [an] unfair practice through the voluntary payment doctrine
 10 would nullify the protections of the act and be contrary to the intent of the
 11 legislature.*** *Id.* (emphasis added). As such, the court held that the voluntary
 12 payment doctrine was not a defense to a violation of the Act. *Id.*

13 The core rationale, analysis, and holding of *Huch* are not only well-reasoned,
 14 but also widely accepted. Courts around the country have issued rulings consistent
 15 with the reasoning in *Huch* in similar consumer cases. *See Sobel v. Hertz Corp.*, 698
 16 F. Supp. 2d 1218, 1221-24 (D. Nev. 2010) (following the reasoning of *Huch II* and
 17 the cases in line with *Huch II* because the legislature enacted the Deceptive Trade
 18 Practice Act primarily for the protection of consumers); *Stock v. Meek*, 35 Cal.2d
 19 809, 817 (1950) (“The theory of [the Usury Law] is that society benefits by the
 20 prohibition of loans at excessive interest rates, even though both parties are willing
 21 to negotiate them. Accordingly, ‘voluntary’ payments of interest do not waive the
 22 rights of the payors”); *Gutierrez v. Wells Fargo & Co.*, 622 F. Supp. 2d 946, 955-56
 23 (N.D. Cal. 2009) (refusing to apply voluntary payment doctrine where class claims
 24 were based in fraud); *see also Buck v. Dahlgren*, 23 Cal. App. 3d 779 (1972); *Indoor
 25 Billboard/Wash. Inc. v. Integra Telecom of Wash., Inc.*, 162 Wash.2d 59, 87 (2007);
 26 *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 339-40 (Mo. 2007); *Ramirez v. Smart
 27 Corp.*, 371 Ill. App. 3d 797, 812 (2007); *Pratt v. Smart Corp.*, 968 S.W.2d 868, 872

1 (Tenn. Ct. App. 1997). Because application of the voluntary payment doctrine
 2 would deprive Plaintiffs of the very remedies the Legislature authorized to deter the
 3 enforcement of penalties in the consumer context, the Court should find that the
 4 doctrine cannot be invoked as a defense to Plaintiffs' consumer protection claims.

5 **B. Plaintiffs Adamson and Clark Did Not Voluntarily Pay
 6 CTCs to ADT**

7 Even if the voluntary payment doctrine applied, and it does not, Plaintiffs'
 8 payments were not in any sense "voluntary." ADT admits that the doctrine only bars
 9 the recovery of money that was *voluntarily paid with full knowledge of the facts*.
 10 Mot. at 16; *see also, e.g., Parino*, 838 F. Supp. 2d at 908-09 (voluntary payment
 11 inapplicable because "payment to her credit card company so that she could stay in
 12 good standing with creditors while pursuing this action would not bar her claim").

13 As explained by the California Supreme Court:

14 Among the instances of the relaxation of the strictness of the original
 15 common law [voluntary payment] rule is the case of payments
 16 constrained by business exigencies, that is payments of illegal charges
 17 or exactions under apprehension on the part of the payers of being
 18 stopped in their business if money is not paid. *It has been stated that
 19 the general rule with regard to duress of this character is that where,
 20 by reason of the peculiar facts a reasonably prudent man finds that in
 21 order to preserve his property or protect his business interests it is
 22 necessary to make a payment of money which he does not owe and
 23 which in equity and good conscience the receiver should not retain, he
 24 may recover it.* Upon this same subject we find the following statement
 25 in 20 California Jurisprudence, page 964: "The underlying principle
 26 (that money paid under compulsion may be recovered) is said to be that,
 27 *by the performance of or threat to perform some unlawful act whereby
 28 plaintiff will suffer loss, the defendant has induced the plaintiff, under
 circumstances sufficient to control the action of a reasonable man, to
 pay money which he would not otherwise have paid.*"

Young v. Hoagland, 212 Cal. 426, 430-31 (1931) (citations omitted, emphasis
 added); *see also Western Gulf Oil Co. v. Title Ins. & Trust Co.*, 92 Cal. App. 2d 257,
 265 (1949) ("Payments of illegal claims enforced by duress, coercion or compulsion,
 when the payor has no other adequate remedy to avoid it, will be deemed to have
 been made involuntarily and may be recovered...."); Steinman v. Malamed, 185 Cal.
 App. 4th 1550, 1558 (2010); Maxwell v. Griswold, 51 U.S. 242 (1850) ("It suffices,

1 if the payment is caused on the one part by an illegal demand, and made on the other
 2 part reluctantly and in consequence of that illegality The payment of the
 3 increased duties thus caused was wrongfully imposed on the importer, and was
 4 submitted to merely as a choice of evils.”).

5 Here, Plaintiffs had no adequate remedy to avoid payment of the CTC. If
 6 Plaintiffs did not pay ADT’s unlawful fee, the unpaid fee would be passed to a
 7 collections agency and would negatively impact their credit. *See* Warncke Dep.
 8 17:16-18, Fisher Ex. D; Stanley Dep. 32:5-10, Fisher Ex. E; McDevitt Dep. 45:12-20

9 [REDACTED], Fisher
 10 Ex. H, UF 60; *see also* UF 49. As the court explained in *Parino*, the voluntary
 11 payment doctrine did not apply to a plaintiff’s consumer claims because “payment to
 12 her credit card company so that she could stay in good standing with creditors while
 13 pursuing this action would not bar her claim.” *Parino*, 838 F. Supp. 2d at 909.
 14 Thus, the circumstances here were “sufficient to control the action of a reasonable
 15 man, to pay money which he would not otherwise have paid.” *See Young*, 212 Cal.
 16 at 430-31. In other words, Plaintiffs “submitted” to payment of the “wrongfully
 17 imposed” fees “merely as a choice of evils.” *See Maxwell*, 51 U.S. at 256.

18 Thus, ADT’s cited cases are distinguishable. In *Lopez v. Washington Mutual*
 19 *Bank FA*, 302 F.3d 900, 904 (9th Cir. 2002), the plaintiffs “**remained free at all**
 20 **times to close their account or change their direct deposit instructions.** Because
 21 they did not do so ... each deposit to the account after an overdraft should be treated
 22 as a voluntary payment of a debt incurred.” (emphasis added). In *Spivey v. Adaptive*
 23 *Marketing LLC*, 622 F.3d 816, 819-20 (7th Cir. 2010), under the terms of
 24 defendant’s membership agreement, Spivey had the right to terminate this agreement
 25 at any time, without consequence. Like the plaintiffs in *Lopez*, plaintiff Spivey had a
 26 clear mechanism and reasonable opportunity to reject the service. *See id.* at 821.

1 Since Plaintiffs had no choice but to pay the CTC to protect their interests (and credit
 2 record), they may recover their payments from ADT in this action.

3 **C. Plaintiffs Adamson and Clark Did Not Pay CTCs with
 4 Full Knowledge of the Facts**

5 ADT's claim that Plaintiffs had full knowledge of the facts is baseless.
 6 Plaintiffs were charged CTCs and believed that they had a contractual obligation to
 7 pay them. *See, e.g.*, UF 49. They could not have known that the CTCs were void
 8 under §1671 and unlawful under consumer protection statutes. *See Am. Oil Serv. v.*
9 Hope Oil Co., 194 Cal. App. 2d 581, 586 (1961) ("[I]t is elementary that an
 10 excessive payment made in ignorance of the fact that it is excessive is recoverable.").
 11 There is no evidence – and ADT will be hard-pressed to present any – that the
 12 Plaintiffs' knew they had and were releasing a statutory right to recover the CTCs.
 13 As one court cogently explained:

14 [W]e would be disinclined to find a "waiver" unless and until an
 15 applicant is shown to have knowingly and unmistakably waived *the very*
16 specific statutory rights at issue. Our Supreme Court has stated the
 17 applicable rule in the following words: "[I]t is settled law in California
 18 that a purported "waiver" of a statutory right is not legally effective
 19 unless it appears that the party executing it has been fully informed of
 20 the existence of that right, its meaning, the effect of the "waiver"
 21 presented to him, and his full understanding of the explanation."
 22 Another court of appeals has written on this point "[t]o constitute a
 23 waiver, it is essential that there be an existing right, benefit, or
 24 advantage, a knowledge, actual or constructive, of its existence, and an
 25 actual intention to relinquish it or conduct so inconsistent with the intent
 26 to enforce the right in question as to induce a reasonable belief that it
 27 has been relinquished."

28 *Bickle v. City of Piedmont*, 45 Cal. App. 4th 313, 42 Cal. Rptr. 2d 787, 793 (1995)
 (emphasis added; citations omitted; reversed on other grounds).

Again, ADT's cases are inapposite. In *Salling v. Budget Rent-A-Car Systems, Inc.*, 672 F.3d 442, 445 (6th Cir. 2012), "Salling paid the charge *in anticipation of filing suit* and he received a receipt that enumerated the \$13.99 charge in question separately from all other rental charges." Unlike in *Salling*, here, Mr. Adamson

1 stated that when he paid the CTC he had no intention of filing a lawsuit. Adamson
 2 Dep. 23:4-9, Fisher Ex. I. Mr. Clark likewise testified that he learned that the CTC
 3 was illegal only after his mother paid the fee. Clark Dep. 61:23-62:10, Fisher Ex. C.

4 In *Spivey*, the plaintiff asserted “that he paid the charge under a mistake of fact
 5 - a recognized exception to the applicability of the voluntary payment doctrine.”
 6 *Spivey*, 622 F.3d at 823. But the mistake Spivey alleged had nothing to do with the
 7 actions of defendant. *Id.* Spivey claimed that he mistakenly believed that the
 8 defendant’s bills were for a product he did not recognize but assumed his wife had
 9 purchased. *Id.* Instead of asking his wife, he continued to pay service charges. *Id.*
 10 Here, Plaintiffs did not pay the fees in anticipation of filing suit, and they could not
 11 have simply consulted a family member about the legality of the fees. Indeed, Mr.
 12 Adamson sent ADT a check to pay the CTC *before* he learned that he might have a
 13 legal claim against ADT. *See* Adamson Dep. 43:22-44:1, 44:17-45:4, Fisher Ex. I;
 14 *see also* Clark Dep. 61:23-62:10, Fisher Ex. C. ADT fails to meet its burden of
 15 showing that the voluntary payment affirmative defense bars Plaintiffs’ consumer
 16 protection claims.

17 **D. Plaintiffs Stanley and Warncke Have Standing**

18 ADT incorrectly claims that being charged a challenged fee does not confer
 19 Article III standing. Mot. at 18. The obvious injury and remedy available to those
 20 who were charged but did not pay the illegal fee is the invalidation of the fee and
 21 reversal, or crediting back, of the charge. *See* 12/4/2008 Statement of Decision,
 22 *Ayyad v. Sprint*, Superior Court of Alameda County, Case No. RG03-121510, at
 23 23:12-14, Fisher Ex. J (“For the accounts still in Sprint’s possession, the Court orders
 24 that ***Sprint must reverse the charges to class members for any charged put unpaid***
 25 ***flat ETFs*** and is enjoined from attempting to collect the unpaid flat ETFs from class
 26 members.” (emphasis added)); *see also* 6/9/2006 Class Certification Order, *In re*
 27 *Cellphone Termination Fee Cases*, Superior Court of Alameda County, J.C.C.P.
 28

1 4332, at 8:21-25, Fisher Ex. K (“The Court will define the class as all persons who
 2 were charged an ETF....**Whether a consumer actually paid the ETF will affect**
 3 **whether the relief will be in the form of money or a declaration that no money is**
 4 **owed.”); *In re Cellphone Termination Fee Cases*, 2008 WL 2332971, at *1 (June 9,
 5 2008) (noting that the trial court granted certification of the ETF Payer Class that
 6 consisted of “all California consumers who were *charged or* paid an early
 7 termination fee to Defendants ...” (emphasis added); *In re Cellphone Termination*
 8 *Fee Cases*, 186 Cal. App. 4th 1380, 1391 (2010) (noting that the “claim form
 9 requires that individuals identify themselves as a customer who ‘paid a flat [ETF],’”
 10 or who “was charged but did not pay a flat [ETF]” and describing the terms of the
 11 settlement: “Class members who claim that they paid a flat-rate ETF but are unable
 12 to offer any proof of such payment will receive an Allowed Claim of \$25, as will
 13 members who allege that they suffered harm as a result of having been charged a
 14 flat-rate ETF that they did not pay”).**

15 ADT half-heartedly suggests that although Plaintiffs may have “statutory
 16 standing” they do not have “Article III standing.” *See* Mot. at 17-18. In support of
 17 its contention, ADT states that “the absence of an injury attributable to the
 18 defendant’s conduct deprives the plaintiff of Article III standing.” *Id.* But Plaintiffs
 19 who were charged, but did not pay, ADT’s CTC *do* have an injury *directly*
 20 *attributable to ADT’s conduct*: they still owe a CTC unlawfully charged by ADT.
 21 As a result, they have been personally injured. Their injury is not one suffered by
 22 “other, unidentified members of the class.” *See* Mot. at 18.

23 Additionally, as a result of their outstanding CTC charges, Ms. Stanley and
 24 Ms. Warncke have suffered further harm. When Ms. Warncke was asked “what
 25 other harm, if any, have you suffered because of ADT,” she answered “I’ve received
 26 multiple credit calls, past collection notices, harassing credit agencies of various
 27 sorts.” Warncke Dep. 17:16-18, Fisher Ex. D. Similarly, Ms. Stanley testified that
 28

1 the outstanding CTC had a negative impact on her credit report. Stanley Dep. 32:5-
 2 10, Fisher Ex. E. Damage to one's credit score is an objectively identifiable loss
 3 under the MCPA. *Neal v. Residential Credit Solutions, Inc.*, 2013 WL 428675, at *5
 4 (D. Md. Feb. 1, 2013); *see also Townsend v. Nat'l Arbitration Forum, Inc.*, 2012 WL
 5 12736, at *6 (C.D. Cal. Jan. 4, 2012) (stating that allegations of injury relating to
 6 credit score reports conferred Article III standing); *White v. Trans Union, LLC*, 462
 7 F. Supp. 2d 1079, 1080-84 (C.D. Cal. 2006) (finding UCL standing where plaintiffs
 8 alleged on behalf of a class that TransUnion had "employ[ed] credit reporting
 9 practices that they allege falsely declare their discharged debts to be 'due and owing'
 10 and thereby inappropriately taint Plaintiffs' credit reports") (cited with approval in
 11 *Rubio v. Capital One Bank*, 613 F.3d 1195, 1204 (9th Cir. 2010)); *Aho v.*
 12 *AmeriCredit Fin. Servs., Inc.*, 2011 WL 2292810, at *2 (S.D. Cal. June 8, 2011)
 13 (finding economic injury because "his credit report has been negatively affected by
 14 defendant's reporting of the deficiency to credit reporting agencies").

15 ADT also incorrectly claims that *Delano Farms Co. v. California Table Grape*
 16 *Commission*, 546 F. Supp. 2d 859, 890 (E.D. Cal. 2008) supports the proposition that
 17 being charged a challenged fee is insufficient to confer standing. ADT asserts that,
 18 in *Delano Farms*, partial summary judgment was granted "because the plaintiff
 19 lacked standing in that it 'never paid [the challenged] assessments.'" Mot. at 18. But
 20 the plaintiff that ADT's quote refers to, the Susan Neill Company, "never itself
 21 bor[e] the costs of assessment," instead it "always passed the cost of the assessment
 22 on to Lucas Brothers Partnership." *Delano Farms*, 546 F. Supp. 2d at 888. As such,
 23 the Susan Neil Company did not owe the costs of assessment.

24 Similar to the facts in *Delano Farms*, in *Hargis v. Access Capital Funding,*
 25 *LLC*, 674 F.3d 783, 787 (8th Cir. 2012), a third party bank, not the plaintiffs, paid a
 26 "yield spread premium," defendant's compensation for bringing plaintiffs' business
 27 to the bank, that "accounted for" the "two fees central to [the] case." *Id.* at 787-88.

1 Likewise, in *Colapinto v. Esquire Deposition Services, LLC*, 2011 WL 913251, at *2
 2 (C.D. Cal. Mar. 8, 2011), the plaintiff lacked standing because his counsel had paid
 3 for the deposition transcripts at issue *on his behalf*. Thus, it would have been
 4 completely inappropriate to award plaintiffs “restitution and disgorgement” of fees
 5 paid in connection with the transcripts. *See id.* Differently, here, Plaintiffs Stanley
 6 and Warncke did not pass the costs along to another individual or entity, and no
 7 intermediary paid the CTC on Plaintiffs’ behalves. Instead, their unpaid CTCs are
 8 still outstanding. As such, unlike the plaintiffs in *Delano Farms, Calapinto*, and
 9 *Hargis*, Plaintiffs Stanley and Warncke are entitled to relief, such as invalidation of
 10 the fee and reversal, or crediting back, of the charge.⁶

11 **E. Plaintiff Clark Also Has Standing**

12 In a failed attempt to show that Ms. Clark was not subject to a CTC, ADT
 13 incorrectly claims that Ms. Clark’s contract “would have been completed in the last
 14 millennium.” In fact, Ms. Clark entered into new agreements with ADT in 2006 and
 15 in 2010. UFs 53, 54. On January 28, 2006, Ms. Clark entered into a Companion
 16 Service Agreement with ADT that provided for an emergency response system
 17 connected to a pendant that Ms. Clark wore around her neck. UF 53. On February
 18 26, 2010, Ms. Clark entered into an Additional Services Rider contract with ADT
 19 that incorporated her original services contract. UF 54. That contract provided for
 20 an extension of the original contract for an unspecified period of years.⁷ UF 55.

21
 22 ⁶ *Barrows v. Chase Manhattan Mortgage Corp.*, 465 F. Supp. 2d 347, 361 (D.N.J.
 23 2006) is also clearly distinguishable. There, the plaintiff claimed that defendants
 24 imposed excessive fees in connection with foreclosure proceedings. *Id.* at 352. The
 25 court concluded that when the plaintiff filed her complaint, “her claim was
 26 hypothetical, as there was a *possibility* she would have to pay attorneys’ fees and
 27 costs in order to resolve the foreclosure action. Now, however, that the foreclosure
 28 action has been resolved without her having to pay any attorneys’ fees and costs, her
 claim went from hypothetical to nonexistent.” *Id.* at 354 (emphasis added). Not
 only did the plaintiff not pay excessive fees, she did not *owe* the fees at issue at all.

⁷ Despite the fact that the Services Rider contained an adhesive provision providing
 for an extension of the original contract, ADT may dispute that the Services Rider

1 Mr. Clark testified repeatedly and adamantly that his mother paid a CTC. *See*
 2 Clark Dep. 36:20-21, 37:21-22, 38:1-3, 39:1-16, 41:1-7, 130:16-21, 133:18-19, 134:
 3 11-15, Fisher Ex. C. Moreover, contrary to ADT's contention, ADT's records are
 4 incomplete and do not establish that ADT never charged Ms. Clark a CTC or that
 5 Ms. Clark did not pay the fee. *See* Mot. at 5. The document ADT terms "Clark
 6 Billing History" shows payments related to the "ANSC" or Annual Service Charge,⁸
 7 made in "Quarterly Billing Payment[s]" and System Installation charges. Harris
 8 Decl., Ex. B (Clark Dep. Ex. J). The "Clark Billing History" does not state that a
 9 CTC was inapplicable or waived. *Id.* Further, the document does not reflect all
 10 payments made by Ms. Clark to ADT. Ms. Clark signed Companion Services
 11 contract on January 28, 2006, at a rate of \$34.95, but those charges and
 12 corresponding payments do not appear in the "Clark Billing History." *Compare*
 13 Clark Companion Services Contract, Fisher Ex. L, *with* Harris Decl., Ex. B (Billing
 14 History). Additionally, with regard to Ms. Clark's account, Mr. Clark testified that
 15 "[a]s my experience in talking with ADT with her service problems, you got a
 16 different story every time you talked to ADT." Clark Dep. 51:6-17, Fisher Ex. C.
 17 Further, Mr. Clark's "testimony on this issue" does *not* derive solely from
 18 conversations with his mother. As mentioned, Mr. Clark regularly called ADT on
 19 behalf of his mother. UF 52. Indeed, Mr. Clark, rather than his mother, called ADT
 20 to cancel Ms. Clark's ADT service when she moved to assisted living. UF 50.
 21 Finally, like Mr. Adamson, Mr. Clark did not know that the CTC charged to his
 22 mother was illegal. Clark Dep. 61:23-62:10, Fisher Ex. C.⁹

23 contract extended Ms. Clark's original contract because the period of years box was
 24 left blank. But the Services Rider contract contains several blanks. Fisher Decl. Ex.
 25 L. Especially given that the underlying facts must be viewed in the light most
 26 favorable to Plaintiffs, based on the extension provision a jury could find that Ms.
 27 Clark's contract was extended.

28 ⁸ *See* Porpora Dep. 265:24-266:7, Fisher Ex. A (defining "ANSC").

⁹ Plaintiff did not substitute Plaintiff Michal Clark for former plaintiff Emily Hogan.
See Mot. 5. In the FAC, Ms. Hogan brought California consumer protection claims

1 VI. SUMMARY JUDGMENT ON THE TILA CLAIM SHOULD BE DENIED

2 A. Plaintiff Llewellyn's TILA Claim Is Not Barred by the Statute of Limitations

3 ADT erroneously claims that Mr. Llewellyn's TILA claim is time-barred.
4 While it is correct that 15 U.S.C. § 1640(e) provides that any claim for damages
5 under TILA must be brought "within one year from the date of occurrence of the
6 violation," the Ninth Circuit has "clearly establishe[d] that the running of the
7 limitations is suspended until such time as the plaintiff knew or should reasonably
8 have known of the violation." *Yang v. Home Loan Funding, Inc.*, 2010 WL 670958,
9 *5-*6 (E.D. Cal. Feb. 22, 2010) (quotations and citations omitted).¹⁰

10 Here, Plaintiff Llewellyn challenges ADT's practice of unilaterally increasing
11 its monthly fees while in the initial term of a contract with its customers. These price
12 increases are not specifically disclosed at the time a contract with ADT is executed.
13 *See* Slattery Exs. A, F, K, N, and R (customer contracts). By increasing rates in the
14 midst of an initial contract term, ADT violates TILA's requirement that the total of
15 all payments required to be made under a contract be fully disclosed at the time of its
16 inception.¹¹ Although ADT purports to reserve the right to increase charges on its
17 customers during an initial contract term (*see, e.g.*, UF 11, 23), neither Plaintiff

18 because in "August 2011, Defendant unilaterally increased her rate, without the
19 required prior notice." Corrected First Amended Complaint ("FAC") ¶ 63, Dkt. No.
20 44. In the FAC, she sought to represent a California "increased fee" class, which
21 was a distinct class from "The California ETF Class" that Mr. Adamson, as well as
Mr. Clark, seek to represent. *Id.* at 68; SAC ¶ 70, Dkt. No. 60.

22 ¹⁰ In addition to a right to statutory relief and damages, TILA also creates a right of
rescission and a corresponding remedy of restitution. 15 U.S.C. §1635(a), (b). This
right to rescind must be exercised within a three-year period from the date of the
transaction. *Id.* at §1635(f). Because three years did not elapse from the time that
Llewellyn entered into contract with ADT in August 2011 and the commencement of
this lawsuit, Plaintiff's claims for rescission and restitution under §1635 are timely.

23 ¹¹ ADT reserves the right to increase its monthly fees only after the contract has been
in place for one year. UF 23. If the statute of limitations period starts to run at the
time the contract is executed, ADT will successfully immunize itself from any TILA
claim challenging these practices because ADT does not raise its rates until after the
initial year (and therefore the statute of limitation period) has passed.

1 Llewellyn nor any other class member could possibly have known that ADT would
 2 in fact charge them a monthly fee greater than the amount set forth in their term
 3 contract *until the time at which ADT charged them a monthly fee greater than the*
 4 *amount set forth in their term contract.* For Plaintiff Llewellyn that did not occur
 5 until October 2012, less than one year before he brought suit. UF 26. Plaintiff
 6 Llewellyn did not know and could not have known that ADT would increase his rate
 7 at all, and if so by how much, until he received a notice of rate increase from ADT in
 8 or about October 2012. *See, e.g.*, UF 23 (“The Llewellyn contract calls out ... that
 9 ADT *may* increase his monitoring fee after the first year of service”); UF 27
 10 (“While ADT makes every effort to keep monitoring and service fees low, *at times*
 11 we need to reevaluate our rates”). The statute of limitations did not begin to run
 12 on Llewellyn’s TILA claims when he entered into a contract with ADT in August
 13 2011 because the relevant TILA violations were not yet ripe. As explained in *Yang*:
 14 “Logic dictates that where, as here, the violation complained of consists of non-
 15 disclosure, there can be no notice of the term or terms that were not disclosed until
 16 those terms are imposed” *Yang*, 2011 WL 670958, at *6.

17 ADT argues that Llewellyn’s claims should have been apparent to him at the
 18 time he entered into a contract with ADT because the contract contains a boilerplate
 19 provision which purports to reserve ADT’s right to increase his fees. Mot. at 21.
 20 However, that provision, even if read and understood by Llewellyn, did not require
 21 ADT to increase Llewellyn’s rates. Llewellyn Dep. 70:2-4, Fisher Ex. F; UF 23.
 22 Indeed, even though that same boilerplate provision is currently set forth in ADT’s
 23 California contracts, ADT does not increase fees on its California customers during
 24 the initial term. UF 11. Until ADT actually increased Llewellyn’s rates, he could
 25 not have asserted a claim based upon ADT’s charging him a rate greater than the rate
 26 which he contracted for.

27 In *Plascencia v. Lending 1st Mortgage*, 583 F. Supp. 2d 1090, 1096-97 (N.D.
 28

1 Cal. 2008), the court refused to dismiss a TILA claim as time-barred. The Court
 2 found that, although the contract documents were literally accurate, plaintiffs sought
 3 to show that the defendants obscured crucial terms of the mortgage that did not
 4 become apparent until after the initial documents were executed. *Id.* at 1097. Based
 5 on this alleged obfuscation, the plaintiffs did not have sufficient information to know
 6 of their claim based on the contract alone. *Id.* Here, ADT similarly obscured its
 7 TILA violations by failing to accurately disclose the actual monthly fees, by
 8 purporting to reserve a right to increase fees that it may or may not choose to
 9 exercise, and by including this purported reservation in small font, in a nearly
 10 illegible boilerplate multi-page form contract. UF 23; Slattery Ex. K (Llewellyn
 11 Contract), at 4.

12 Because the contract did not fully disclose the facts that form the basis of his
 13 TILA claims, Llewellyn's limitation period did not begin until he received a notice
 14 of rate increase from ADT in October 2012. Accordingly, his claim for damages
 15 falls within the one-year limitations period and is timely.

16 **B. Plaintiff Llewellyn's TILA Claim Is Not Barred by the
 17 Voluntary Payment Doctrine**

18 As explained above, the voluntary payment doctrine is not a permissible
 19 defense against consumer protection claims. *See, e.g., Gutierrez*, 622 F.Supp. 2d at
 20 955-56. The doctrine should not prevent Mr. Llewellyn from challenging ADT's
 21 illegal fee increases because his payments were not voluntarily made with full
 22 knowledge of the facts. *See id.* (voluntary payment did not apply where the plaintiff
 23 had not "explicitly consented" to the challenged practice; record did not show that
 24 the plaintiff was aware of the precise parameters that led to the claim). Mr.
 25 Llewellyn "had no choice" other than to pay the increased fees. Llewellyn Dep.
 26 62:8-63:6, Fisher Ex. F. At the time of the fee increase, Mr. Llewellyn did not know
 27 and had no reason to know that he had the option of not paying the increased fee
 28 because ADT's notice and website concealed the fact that he had a right to refuse to

1 pay the increase. *Id.* at 32:16, 62:8-63:6. Further, Mr. Llewellyn felt compelled to
 2 make the payments because he correctly believed he would be subject to a
 3 substantial penalty if he terminated early *for any reason*. *Id.* at 56:23-57:21. Mr.
 4 Llewellyn's payment was not voluntary because a reasonable person in his position
 5 would have paid rather than risk being sent to collections, or risk being charged a
 6 CTC. *See Steinman*, 185 Cal. App. 4th at 1558 (considering whether a reasonable
 7 person would have made payment to preserve his interests).

8 **C. ADT's Increased Fee Provision Is Unlawful**

9 ADT claims that its sale of alarm and monitoring equipment and services is
 10 not a "credit" transaction subject to TILA. Mot. at 15-16. ADT falsely claims that
 11 its position is supported by "undisputed" facts. Mot. at 1. These so-called
 12 undisputed facts are in fact disputed. ADT relies wholly on the self-serving
 13 deposition testimony of its executives in support of the facts it claims are undisputed.
 14 However, discovery in this case is ongoing, and ADT has brought an early motion
 15 for summary judgment. It is improper for ADT to claim at this stage of the case that
 16 facts are undisputed when discovery is continuing and is not closed. *See James v.*
 17 *UMG Recording, Inc.*, 2012 WL 1376977, at *4 (N.D. Cal. Apr. 19, 2012) (denying
 18 summary judgment where discovery was ongoing and plaintiffs had not had full
 19 opportunity to gather facts and evidence in opposition).

20 Plaintiffs specifically allege that the sale of equipment and services constitute
 21 credit transactions because customers received equipment and installation at the start
 22 of the contract that was worth more than their initial payment, such that they
 23 assumed a debt to be paid in monthly installments and have an unconditional
 24 obligation to pay ADT. *See SAC ¶¶ 167-172; see Mourning v. Family Publ's Serv.,*
 25 *Inc.*, 411 U.S. 356, 366 (1973). The facts alleged in Plaintiff's SAC have now been
 26 confirmed. ADT controls its dealers' ability to offer discounted equipment, and
 27 ADT controls the content of any advertising and rebates/reductions offered by its
 28

1 dealers. *See* Fisher Ex. B, ADT0010818-9 (Dealer vs. ADT responsibilities). ADT
2 runs credit checks on its customers and has established a minimum credit score
3 required to become a customer, providing further indicia that ADT is acting as a
4 creditor. Porpora Dep. 300:4-13, Fisher Ex. A; Rabaa Dep. 20:19-24, Fisher Ex. S.
5 ADT's monthly fees vary based upon the value of the equipment that is provided.
6 *See* Rabaa Dep. 49:18-24, Fisher Ex. S. Customers who purchase expensive
7 equipment at a "discount" are charged more per month than customers who purchase
8 less expensive equipment. Fisher Ex. M, ADTLLC00329545 (describing pricing
9 depending on install). Notwithstanding ADT's self-serving statements, it is
10 reasonable to infer that the monthly fees paid to ADT are actually, in whole or in
11 part, installment payments on the sale of equipment – monthly installment payments
12 that are intended to compensate ADT for accepting \$99 up-front for equipment
13 allegedly worth \$850. Fisher Ex. N (ad for free \$850 system for \$99 install and
14 purchase of monitoring). Further, contrary to ADT's assertion, ADT clearly seeks to
15 recoup the value of installation discounts by requiring a long-term contractual
16 commitment for set monthly payments. *See* Mot. at 16. In fact, as Mr. Llewellyn
17 testified: when his equipment malfunctioned ADT offered him choice between
18 paying for expensive equipment or entering into a new contract. Llewellyn Dep.
19 13:1-7, Fisher Ex. F. That testimony shows that ADT recoups its initial investment
20 on equipment sold at a discount by requiring that customers pay in monthly
21 installments for the term of the contract. *See id.*

22 **VII. CONCLUSION**

23 For the foregoing reasons, ADT's motion for summary judgment should be
24 denied in its entirety.

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